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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION SEVEN

MICHAEL MCGANN,

Plaintiff and Appellant,

v.

CITY OF LOS ANGELES et al.,

Defendants and Respondents.

B153262

(Los Angeles County  
Super. Ct. No. BS060996)

APPEAL from a judgment of the Superior Court of Los Angeles County.

David P. Yaffe, Judge. Affirmed.

Silver, Hadden & Silver, Susan Silver and Elizabeth S. Tourgeman for  
Plaintiff and Appellant.

Rockard J. Delgadillo, City Attorney, Cheryl Ward, Senior Assistant City  
Attorney, and Matthew C. St. George, Deputy City Attorney, for Defendants and  
Respondents.

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## ***SUMMARY***

Michael McGann, an officer with the Los Angeles Police Department, filed a petition for writ of administrative mandamus in connection with Departmental discipline he received for certain misconduct. He appeals from the trial court's partial denial of his petition on the ground that his "reduction in paygrade" in addition to a 22-day suspension constituted "double punishment" in violation of City Charter section 202 and the policy underlying Penal Code section 654, subdivision (a). We affirm.

## ***FACTUAL AND PROCEDURAL SYNOPSIS***

McGann became a sworn peace officer with the Los Angeles Police Department in January 1984 and was promoted to Police Officer II upon completion of his probationary period. In March 1994, he was promoted to the rank and paygrade of Police Officer III. In January 1996, McGann became a training instructor at the Police Academy in Echo Park, responsible for providing tactical instruction of police officer recruits as well as in-service training for other Department locations.

In mid-March 1998, McGann's supervisor advised McGann of complaints he had received about McGann's conduct as an instructor. McGann was relieved of his training responsibilities at the end of the month but remained in his rank/paygrade assignment. In September, McGann received a memorandum from the Commanding Officer of the Training Division recommending an administrative transfer and reduction in paygrade from Police Officer III to Police Officer II based on the conduct alleged in the complaints.<sup>1</sup> McGann was advised that the requested administrative transfer and

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<sup>1</sup> According to the memorandum, the Department's investigation had revealed that McGann had been "involved in a training exercise during which he attached a mirror to his right boot. He then placed his right boot between the feet of a female recruit officer. The implication was that the mirror could be used to look up a woman's dress." It was further alleged that McGann had mimicked Asian recruits and made inappropriate

paygrade reduction were “separate and apart” from the disciplinary action arising out of the misconduct for which he was already under investigation. The transfer and paygrade reduction (about a 5 percent decrease in salary) became effective at the end of September.

In March 1999, the Department notified McGann that he was to appear before a Board of Rights pursuant to City Charter section 202 to answer seven charges of misconduct against him arising out of the same events precipitating his reduction in paygrade.<sup>2</sup> The Board of Rights hearing was conducted over four days in June, September and December. Based on McGann’s own admissions of misconduct as well as the corroborating statements of witnesses, McGann was found guilty of two counts involving “the more serious charges”—(1) the allegation that, “while on duty, [he had] attached a mirror to [his] boot and inappropriately placed it between the legs of a female recruit” and (2) the allegation that he had made “inappropriate remarks in the presence of the recruit class.” He was found not guilty on five other counts. In April 2000, the Board recommended a 22-day suspension for the two counts on which McGann was found guilty. The Chief of Police (who could either accept or reduce the recommended punishment but could not increase it) imposed the 22-day suspension in May.

McGann timely requested an appeal of his administrative transfer and paygrade reduction (in October 1998). (Gov. Code, § 3304, subd. (b).) When he did not receive

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comments to African Americans during instruction. Commenting that McGann’s inappropriate behavior created a hostile work environment for both students and peer instructors and placed the Department in a position of strict liability, the Commanding Officer concluded that McGann’s conduct showed a lack of maturity, respect and dignity for fellow employees and that McGann had “failed as an instructor by not providing the climate necessary for growth and personal development of recruit officers.”

<sup>2</sup> The City Charter was revised and renumbered as of July 1, 2000. Former section 202 now appears in section 1070 as modified. (*Brown v. City of Los Angeles* (2002) 102 Cal.App.4th 155, 162, fn. 1.) Because former section 202 was applicable at all times relevant to these proceedings, all citations to the City Charter shall refer to the provisions in effect before July 2000.

one (the Department and the Los Angeles Police Protective League were still in negotiations and had yet to finalize the procedures governing the administrative appeal process), he filed a petition for writ of administrative mandate under Code of Civil Procedure section 1085 and for extraordinary relief under Government Code section 3309.5 in December 1999.

In his first cause of action, McGann alleged that, unless his reduction in paygrade was set aside retroactively, he would be subjected to “double punishment” in violation of section 202, subdivision (18) of the City Charter and in violation of the public policy set forth in section 654 of the Penal Code. In his second cause of action, he alleged that the Department had failed to comply with section 763.60 of the Department’s own manual. In his third cause of action, McGann asserted that the Department had violated Government Code section 3304, subdivision (b) in failing to afford him an administrative appeal from his paygrade reduction.

After the City of Los Angeles and Bernard Parks (included hereinafter in our references to the Department) answered the petition and the parties submitted briefing, the trial court (Hon. Gregory O’Brien) conducted a hearing in December 2000 and subsequently (on February 5, 2001) entered a “judgment” dismissing without prejudice McGann’s petition for writ of mandate as premature for failure to exhaust administrative remedies, subject to the Department’s setting of a date for McGann’s administrative appeal to be heard, with proof provided to the court by March 1. The court set an order to show cause hearing for February 8 (after the entry of “judgment”) to determine the status of McGann’s administrative appeal. In the meantime, the Department submitted declarations regarding progress toward setting the administrative appeal hearing. McGann objected that the failure to provide a hearing by the February 2001 date necessitated a ruling on the merits as to the issues of law raised in his petition.

When the February OSC date arrived, the trial court (Hon. David Yaffe from this point forward) continued the hearing to March 1 “to conform with Judge O’Brien’s *order* of February 5, 2001.” (Italics added.) After another continuance, the Department filed

proof on March 27 that McGann's administrative appeal hearing was set for June 7 (two-and-a-half years after the effective date of his transfer and reduction in paygrade and request for administrative appeal). On March 28, the trial court ordered the parties back on July 10 with proof that McGann had been afforded his administrative remedies. After the Department filed proof that the administrative hearing had been accomplished, the trial court granted in part and denied in part McGann's petition.

As to McGann's first cause of action, the trial court determined that McGann had not been tried twice for the same offense in violation of City Charter section 202, subdivision (18) because section 202 does not apply to reductions in paygrade or similar personnel actions pursuant to subdivision (13)(f) of section 202. As for his second cause of action, the court determined that McGann failed to prove there was no need for his immediate reassignment under section 763.60 of the Department manual. As to his third cause of action, the court ruled that because the Department had failed to provide McGann with a timely administrative appeal, he was entitled to back pay.

In August, the trial court entered judgment requiring the Department to provide McGann with back pay (the difference between the full compensation he would have received as a Police Officer III and the compensation he actually received plus interest) for the period during which his compensation was reduced but he was denied the opportunity for an administrative appeal less 60 days. The judgment further stated: "[McGann] is not precluded from pursuing a Petition for Writ of Mandate challenging the June 7, 2001 administrative appeal hearing decision, including, but not limited to, whether the reduction in paygrade was accomplished in accordance with the provisions of [s]ection 763.60 of the [Department] Manual" (notwithstanding the contrary indication in the court's minute order as summarized in the preceding paragraph).<sup>3</sup> McGann appeals.

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<sup>3</sup> We grant the Department's request for judicial notice of McGann's separate petition filed in September 2001.

## ***DISCUSSION***

### **I. McGann Does Not Lack Standing to Appeal.**

The Department contends that McGann's appeal must be dismissed for lack of standing because the judgment expressly provides that he "is not precluded from pursuing a Petition for Writ of Mandate challenging the June 7, 2001 administrative appeal hearing decision . . . ." It says the focus of McGann's arguments is on Judge O'Brien's February 2001 order which was interlocutory because it called for further administrative proceedings and therefore was not appealable under *Kumar v. National Medical Enterprises, Inc.* (1990) 218 Cal.App.3d 1050. Citing *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, it says McGann must first obtain superior court review of the results of the June hearing if he has objections to it. In the *Johnson* case, the court considered the effect of an *administrative factual* finding and observed that "unless a party to a quasi-judicial proceeding challenges the agency's adverse findings made in that proceeding, by means of a mandate in superior court, those findings are binding in later civil actions." (*Id.* at pp. 69-70.)

The Department ignores the fact that, in the July 2001 minute order preceding the August judgment, the trial court specifically ruled on the double punishment argument asserted in the first cause of action in McGann's petition, concluding that the Department had not violated section 202, subdivision (18) of the City Charter inasmuch as section 202 does not apply to reductions in paygrade under subdivision (13)(f). Necessarily implicit in the judgment requiring the Department to provide McGann with back pay limited to the period during which his compensation was reduced but he was denied the opportunity for an administrative appeal less 60 days (after compelling the Department to afford McGann an administrative appeal) was the rejection of that portion of McGann's petition seeking to retroactively set aside his reduction in paygrade on the ground that the could not be "tried twice" and subjected to "double punishment" for the same offense in

violation of section 202, subdivision (18) of the City Charter and section 654, subdivision (a) of the Penal Code. Stated another way, the trial court would not have ordered a hearing and then limited back pay in this manner unless the paygrade reduction had been found not to be impermissible double punishment.

The determination of a question of law in a prior action between the parties (such as the issue McGann has raised here) may be given collateral estoppel effect in a subsequent action between the same parties. (7 Witkin, Cal. Procedure (4th ed. 1997) Judgments, § 379, p. 948; *Los Angeles v. Los Angeles App. Bd.* (1993) 13 Cal.App.4th 102, 108, fn. 4.) “Collateral estoppel forecloses relitigation of an issue that (1) is identical to one decided in a prior case (2) involving the same party or parties or those in privity with them and (3) which resulted in a final judgment on the merits.” (*Los Angeles v. Los Angeles App. Bd.*, *supra*, 13 Cal.App.4th at p. 108.) Accordingly, McGann did not err in seeking review in this appeal of the trial court’s decision on this issue instead of allowing the judgment in this case to become final and waiting to pursue the double punishment issue in a separate petition for writ of mandate.

## **II. A Reduction in Paygrade Does Not Constitute Impermissible Double Punishment under Section 202 of the City Charter.**

Section 202 of the City Charter provides, in pertinent part:

“(1) The rights of a tenured officer of the Police Department . . . to hold his or her office or position and to the compensation attached to such office or position is hereby declared to be a substantial property right of which he or she shall not be deprived arbitrarily or summarily, nor otherwise than as herein in this section provided. No tenured officer of the Department shall be suspended, demoted in rank, suspended and demoted in rank, removed, or otherwise separated from the service of the Department (other than resignation), except for good and sufficient cause shown upon a finding of ‘guilty’ of the specific charge or charges assigned as cause or causes therefor after a full, fair, and impartial hearing before a Board of Rights . . . .

[¶¶]

“(13)(f) For purposes of this section, demotion in rank shall mean reduction in civil service classification. The provisions of this section shall not apply to reductions in paygrade or similar personnel actions caused by reassignment, deselection from bonused positions, and the like. Such reductions shall be administered under policies adopted by the Department.

[¶¶]

“(18) No officer of the Police Department shall be twice tried for the same offense, except upon the request of the officer. In any case of exoneration of the accused after a hearing before a Board of Rights, such exoneration shall be without prejudice to such officer.” (Los Angeles City Charter, § 202.)

Section 763.60 of the Department Manual (apparently adopted pursuant to City Charter section 202, subdivision (13)(f)) provides in pertinent part:

“When an officer’s immediate supervisor becomes aware that the officer is not satisfactorily performing the duties of his or her advanced paygrade position, the supervisor shall, without delay, counsel the officer regarding deficiencies; complete a Notice to Correct Deficiencies, Form General 78; and cause the form to be approved and distributed. When the officer continues to demonstrate a failure to satisfactorily perform the duties of the position, the officer’s commanding officer shall:

“\*Cause the completion of a Performance Evaluation Report, Form 1.78;

“\*Complete a Request for Transfer and/or Change in Paygrade, Form 1.40;

“\*Complete an Intradepartmental Correspondence, Form 15.2, citing the reasons for recommending reassignment to a lower paygrade or deselection from a bonus position and include a statement that the officer

was advised of the right to provide a written response to the proposed personnel action within 30 days of the date of Notice;

“\*Provide the employee copies of the documents;

“\*Maintain original documentation until the officer’s response is received or 30 days have passed.

“\*After receiving a written response (or 30 days have passed, without a response), attach the original written response to the 15.2 and forward all documentation through channels to the Commanding Officer, Human Resources Bureau. A copy of the officer’s response shall be attached to the officer’s Performance Evaluation Report, which shall be filed in the officer’s personnel files.

“**Exception:** When an officer [sic] clearly demonstrated failure or inability to satisfactorily perform the duties of his or her advanced paygrade position, indicate [sic] the need for an immediate reassignment in the best interests of the Department, the commanding officer shall temporarily place the officer in a lower paygrade assignment and shall, without delay, forward a Form 15.2, and a Form 1.40 through channels to the Commanding Officer, Human Resources Bureau. The officer shall receive the same paygrade salary pending the concurrence of the Commanding Officer, Human Resources Bureau, in the recommendation that the officer be reassigned to a lower paygrade.

“**Note:** When the actions which demonstrate the officer’s failure or inability to satisfactorily perform the duties of his or her position also result in the initiation of a complaint, the reassignment to a lower paygrade position normally shall be accomplished prior to the adjudication and disposition of the complaint. . . .” (Manual of the Los Angeles Police Department, Vol. 3, § 763.60, p. 193.)

McGann acknowledges that reductions in paygrade are “expressly differentiated” from demotions in rank under City Charter section 202, subdivision (13)(f), and changes in paygrade assignments are personnel changes “*within* the[] respective civil service classes” as provided in the Department Manual. Therefore, his reduction in paygrade

from Police Officer III to Police Officer II did not reduce his civil service classification of Police Officer. For purposes of section 202, a demotion in rank is defined as a “reduction in civil service classification,” and section 202’s provisions “shall not apply to reductions in *paygrade*,” instead, these reductions are administered under policies set forth in the Department Manual. (Los Angeles City Charter, § 202, subd. (13)(f), italics added.)

In spite of this acknowledgement, McGann argues that the prohibition in City Charter section 202, subdivision (18) precludes the Department from disciplining him under both City Charter section 202 and section 763.60 of the Department Manual for the same misconduct. He emphasizes that subdivision (18) of City Charter section 202 “does not limit the prohibition against being disciplined twice for the same offense only to those proceedings conducted under the auspices of [s]ection 202” but instead applies to all attempts to discipline officers twice for the same offense.

We disagree. McGann is correct that City Charter section 202, subdivision (18) does not contain any limitation on its prohibition. City Charter section 202, subdivision (13)(f), however, expressly removes “reductions in paygrade” from the scope of section 202—“[t]he provisions of this section shall not apply to reductions in *paygrade*.” Because “reductions in paygrade” are entirely excluded from City Charter section 202, none of the provisions (i.e., subdivisions) of City Charter section 202, including the prohibition against double punishment in subdivision (18) applies to a reduction in paygrade. (See *Baird v. City of Los Angeles* (1975) 54 Cal.App.3d 120, 122-123 [police officer III is a “pay grade” within the civil service classification of “police officer” and is not governed by the procedures in section 202 of the City Charter].)<sup>4</sup>

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<sup>4</sup> McGann urges that *Baird v. City of Los Angeles*, *supra*, 54 Cal.App.3d 120, 123, “strongly indicates” that the double jeopardy protections then contained in section 202 should apply to all disciplinary proceedings, but the officers in that case were not charged with misconduct and says “it is clear” that the *Baird* court “would have ruled differently if presented with a reduction in paygrade based on charges of misconduct as was true in

Further, McGann has not identified any provision in the Department Manual prohibiting his paygrade reduction. In fact, section 763.60 of the Manual anticipates circumstances such as those here where an officer is punished for the same conduct by way of a personnel action under City Charter section 202 and through a reduction in paygrade: “When the actions which demonstrate the officer’s failure or inability to satisfactorily perform the duties of his or her position also result in the initiation of a complaint, the reassignment to a lower paygrade position normally shall be accomplished prior to the adjudication and disposition of the complaint. . . .”

Consequently, the trial court did not err in rejecting the double punishment allegations in McGann’s petition.<sup>5</sup>

In his reply brief, McGann asserts that we recently reached a contrary result in *Brown v. City of Los Angeles*, *supra*, 102 Cal.App.4th at page 179. He is mistaken. In *Brown*, we (1) rejected the Department’s contention that the officer’s appeal was premature for failure to exhaust administrative remedies because he had challenged the adequacy of those measures and argued their futility; (2) determined that the officer had a property interest in his advanced paygrade; and (3) concluded that the administrative appeal process established under Los Angeles Police Department Administrative Order No. 15 denies the appealing officer due process.<sup>6</sup>

For purposes of the future administrative appeal (conducted pursuant to procedures comporting with due process) the trial court was to compel the Department to

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our case.” Because *Baird*, decided 28 years ago, did not consider subdivision (13)(f) of City Charter section 202, we need not address this contention.

<sup>5</sup> The Department requested judicial notice of our unpublished decision in *Cooper v. City of Los Angeles* (B142714, Jul. 16, 2001) but has provided no authority authorizing its reliance on this unpublished opinion. Accordingly, its request is denied.

<sup>6</sup> In his subsequent petition, McGann also challenges the adequacy of the appeal process he was afforded pursuant to Administrative Order No. 15 (among other deficiencies).

provide, we briefly addressed the officer's argument that the Department was *collaterally estopped* from basing his reduction in paygrade on charges as to which his Board of Rights *exonerated* him. We stated: "[The officer's] contention has merit, as [the Department] would be barred from basing punitive action on these matters pursuant to LACC Sections 202(13)(e) and 202(18), as well as principles of collateral estoppel. (*People v. Sims* (1982) 32 Cal.3d 468, 480; *Knickerbocker v. City of Stockton* (1988) 199 Cal.App.3d 235, 242, 244.)"<sup>7</sup> (*Brown, supra*, 102 Cal.App.4th at p. 179; italics added.)

In the context of the officer's argument, our reference to these City Charter sections was to the collateral estoppel aspect of these provisions (and not to any prohibition against being disciplined twice embodied therein). City Charter section 202, subdivision (13)(e) specifies that if an officer is found "*not guilty*," he shall immediately be restored to duty without loss of pay and *without prejudice*. (Italics added.) Similarly, City Charter section 202, subdivision (18), in addition to specifying that "[n]o officer of the Police Department shall be tried twice for the same offense" (the focus of McGann's argument here), also provides as follows: "In any case of *exoneration* of the accused after a hearing before a Board of Rights, such exoneration shall be *without prejudice* to such officer." (Italics added.)

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<sup>7</sup> City Charter section 202, subdivision (13)(e) provides: "A Board of Rights shall at the conclusion of the hearing make specific findings of '**guilty**' or '**not guilty**' on each specific charge, which findings shall be based only upon the evidence adduced before it at such hearing and render and certify a decision in writing. If the accused is found '**not guilty**,' the Board shall order the officer's restoration to duty without loss of pay and without prejudice, and such order shall be self-executing and immediately effective. In case, however, the accused is found '**guilty**,' the Board of Rights shall prescribe its penalty by written order of either suspension for a definite period not exceeding six months with total loss of pay, and with or without reprimand; or demotion in rank, with or without suspension or reprimand or both; or reprimand without further penalty; or of removal, which decision and order must be certified in writing and a copy thereof immediately delivered to the Chief of Police."

However, in his appeal, the officer in *Brown* did not raise the double punishment argument McGann raises here, and we did not determine in *Brown* that separate proceedings under Charter section 202 and section 763.60 of the Department Manual were impermissible as double punishment. Our conclusion that, once a Board of Rights *exonerates* an officer on a particular charge, the Department may not discipline him for the same conduct in other proceedings does not justify the opposite conclusion that, following a Board of Rights finding of *culpability*, an officer may not also be subject to administrative discipline under section 763.60 of the Department Manual, particularly in light of subdivision (13)(f), which specifies that none of the provisions of City Charter section 202 applies to a reduction in paygrade.

McGann did not raise a collateral estoppel argument in the trial court or in his opening brief and, indeed, still stands on his double punishment and double jeopardy arguments in his reply brief.<sup>8</sup> To the extent his citation to *Brown* can be construed as an attempt to raise for the first time in his reply brief a collateral estoppel argument as to the charges of which he was exonerated by a Board of Rights, points raised in a reply brief for the first time, depriving the respondent of an opportunity to answer them, ordinarily will not be considered unless good reason is shown for the failure to present them before. (*Campos v. Anderson* (1997) 57 Cal.App.4th 784, 794, fn. 3; *Akins v. State of California* (1998) 61 Cal.App.4th 1, 17, fn. 9.)

However, McGann has pending a separate petition challenging the decision rendered pursuant to his June 7, 2001, administrative appeal. As in *Brown, supra*, 102 Cal.App.4th at pages 179-180, the record indicates that the Department based its reduction in paygrade on incidents as to which the Board of Rights subsequently exonerated McGann as well as on conduct of which he was found guilty. The issue of whether the charges on which McGann was found guilty are sufficient to support his

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<sup>8</sup> McGann's counsel here also represented the officer in *Brown*.

reduction in paygrade should be addressed in connection with this separate proceeding. (*Id.* at p. 180.)

### **III. Penal Code Section 654, Subdivision (a), Does Not Prohibit McGann’s Reduction in Paygrade.**

McGann says the trial court erred in rejecting his argument that dual punishments for the same misconduct violates Penal Code section 654, subdivision (a). This subdivision provides that “[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other.” (Pen. Code, § 654, subd. (a).)

The Department disciplined McGann through administrative proceedings, not criminal ones. McGann’s reduction in paygrade constitutes civil, employment discipline, not criminal punishment. Principles of criminal law and double jeopardy do not apply in administrative proceedings in the employment context. (*Ziegler v. City of South Pasadena* (1999) 73 Cal.App.4th 391, 397; *Summers v. City of Cathedral City* (1990) 225 Cal.App.3d 1047, 1060, fn. 6; see *Fontana Unified School Dist. v. Burman* (1988) 45 Cal.3d 208, 222.)

McGann has presented neither compelling authority nor persuasive argument that criminal law principles embodied in section 654 or criminal law double jeopardy prohibitions should apply in this context. Consequently, we find no error in the trial court’s rejection of this contention.<sup>9</sup>

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<sup>9</sup> The Department’s cross-appeal was previously withdrawn and dismissed.

***DISPOSITION***

The judgment is affirmed. The Department is awarded its costs of appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WOODS, J.

We concur:

PERLUSS, P.J.

MUÑOZ (AURELIO), J.<sup>\*</sup>

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<sup>\*</sup> Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.